

1 RONALD J. KLEPETAR, Bar No. 52535
2 SABRINA L. SHADI, Bar No. 205405
3 BAKER & HOSTETLER LLP
4 12100 Wilshire Boulevard, 15th Floor
5 Los Angeles, CA 90025-7120
6 Telephone: 310.820.8800
7 Facsimile: 310.820.8859
8 Email: rklepetar@bakerlaw.com
9 Email: sshadi@bakerlaw.com

10 Attorneys for Defendant
11 AMERICAN RED CROSS BLOOD SERVICES
12 SOUTHERN CALIFORNIA REGION, Improperly
13 Sued As The American Red Cross

14 UNITED STATES DISTRICT COURT
15
16 NORTHERN DISTRICT OF CALIFORNIA

17 BRIAN SETENCICH,

18 Plaintiff,

19 v.

20 THE AMERICAN RED CROSS, a non-
21 profit corporation, STEVE BROWN,
22 ROBERT BROWNING and DOES 1
23 through 30, inclusive,

24 Defendants.

Case No. C07-03688 SBA

[Honorable Sandra Brown Armstrong]

**DEFENDANT AMERICAN RED CROSS
BLOOD SERVICES SOUTHERN
CALIFORNIA REGION'S REPLY TO
PLAINTIFF BRIAN SETENCICH'S
OPPOSITION TO MOTION TO DISMISS**

Date: October 2, 2007

Time: 1:00 p.m.

Courtroom: 3

[Complaint filed: March 13, 2007]

I. Plaintiff Has Not and Cannot Allege Sufficient Facts to Support a Claim for Association Discrimination

Plaintiff Brian Setencich's claim for association discrimination should be dismissed because the conclusion that American Red Cross Blood Services Southern California Region's ("ARC") decision not to hire him was motivated by his association with Jackson is refuted by the facts alleged in Plaintiff's own complaint. Specifically, as discussed in ARC's motion to dismiss, Plaintiff's accusation that ARC did not hire him because ARC was motivated by a discriminatory animus toward Jackson due to Jackson's disability is inconsistent with the fact that ARC was making a concerted effort to fill the Communication Manager position in order to assist Jackson. (See Motion to Dismiss, p.3, line 19 to p. 4, line 8 and Complaint, ¶¶ 2 and 16). Plaintiff's silence as to this point is noteworthy and can only be interpreted to mean there is no viable explanation regarding this contradiction between the factual allegations in Plaintiff's complaint and his conclusory statements that he has suffered from association discrimination.

Further, ARC's argument that the prior business relationship between Jackson and Plaintiff is not the type anti-discrimination statutes are aimed to protect should not be summarily ignored, as Plaintiff suggests. It is true that FEHA is broader in certain respects than the ADA; however, the distinctions between these statutes present no meaningful differences with regard to Plaintiff's association discrimination claim. Accordingly, the court may look to decisions interpreting the ADA, such as *Larimer v. International Business Machines Corp.*, 370 F.3d 698, 700 (7th Cir. 2004), in interpreting parallel provisions in FEHA in order to determine that the past, temporary business relationship between Plaintiff and Jackson is not within the intended scope of FEHA's prohibition on association discrimination. See, e.g. *Hanson v. Lucky Stores, Inc.*, 74 Cal.App.4th 215, 224 n. 7 (1999) ("decisions interpreting [the ADA] may be useful in deciding cases under the FEHA.") and *Pensingner v. Bowsmith, Inc.*, 60 Cal.App.4th 709 (1998) ("Because the FEHA is modeled after . . . the Americans with Disabilities Act (ADA) 42 U.S.C.A. § 12101 et seq.), interpretations of these laws are 'particularly useful 'to guide the construction'' of the California statute.")

1 Plaintiff's complaint does not allege facts sufficient to state a cause of action for
2 association discrimination, and his opposition to ARC's motion fails to show that sufficient facts
3 have been or could be alleged through an amendment. Therefore, ARC's motion to dismiss
4 should be granted as to the first purported cause of action, without leave to amend.

5 **II. Simply Providing a Date and Naming the Individual Who Made the "Fraudulent**
6 **Representations" Will Not Cure the Defects In Plaintiff's Fraud Claim**

7 ARC has moved to dismiss Plaintiff's fraud claim on the grounds that his allegations do
8 not meet the strict pleading standards imposed by state and federal law. Plaintiff has responded
9 by seeking leave to amend to identify the "specific individual from ARC who made the fraudulent
10 representations and the approximate date." While these additional allegations would be helpful,
11 they will not suffice to sustain Plaintiff's fraud claim. Specifically, with the addition of such
12 allegations, the complaint would still fail to allege a particular promise ARC made to Plaintiff as
13 well as facts to support the conclusory allegation that "defendants had not intended to live up to"
14 their "promises."

15 A general allegation of lack of intent is insufficient unless the plaintiff alleges specific
16 facts from which such a lack of intent may be inferred by the court. *See Hills Transp. Co. v.*
17 *Southwest Forest Indus.*, 266 Cal.App.2d 702, 707-708 (discussing the well established rule that
18 pleadings of fraud and deceit must be specific). There are no allegations in Plaintiff's complaint
19 from which the falsity of ARC's intentions could be inferred. The fact that Plaintiff ultimately
20 was not hired is not enough. *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481.
21 Further, without sufficient allegations regarding ARC's intentions regarding hiring Plaintiff,
22 Plaintiff's claim appears to be one of negligent misrepresentation regarding Plaintiff being hired.
23 However, as discussed below, to be actionable, a negligent misrepresentation must ordinarily be
24 as to past or existing material facts. *Tarmann v. State Farm Mutual Automobile Insurance Co.*
25 (1991) 2 Cal.App.4th 153, 158.

26 Because Plaintiff's allegations are insufficient to state a cause of action for fraud and his
27 proposed amendments will not cure the numerous defects, ARC's motion to dismiss the second
28 purported cause of action should be sustained without leave to amend.


1 **III. There Is No Misrepresentation As to a Past or Existing Fact to Support A Negligent**
 2 **Misrepresentation Claim**

3 Without addressing the legal authorities presented in ARC's motion to dismiss, Plaintiff
 4 summarily states that his claim for negligent misrepresentation is sufficiently pled. Plaintiff's
 5 concise statement of his position does not address that (a) there is no allegation that ARC
 6 intended to induce reliance on any representation allegedly made to him, (b) there are no facts
 7 alleged from which the conclusion that ARC intended to induce his reliance can be drawn, and (c)
 8 there are no allegations or facts to support an allegation that Plaintiff justifiably relied on a
 9 representation by ARC which caused him damage. Further, Plaintiff has not addressed the fact
 10 that the implied (but not actually alleged) misrepresentation that Plaintiff would be hired by ARC
 11 did not involve a past or existing material fact; if such a representation had been made, it would
 12 have involved a promise to perform at some future time. Such promises are not actionable as
 13 negligent misrepresentation. *See Id.* at 158-159. ("[T]he court properly sustained the demurrer"
 14 where, "the gist of both Tarmann's fraud and negligent misrepresentation claims is that State
 15 Farm said it *would* pay for her repairs *immediately upon their completion*, it failed to do so,
 16 Tarmann could not complete the repairs or redeem her vehicle, and she lost the use of it until
 17 State Farm settled the case;)" (emphasis in original).

18 Because Plaintiff's allegations are too uncertain, and because Plaintiff has not and cannot
 19 allege that ARC made an actionable misrepresentation to him as to a past or existing fact, ARC's
 20 motion to dismiss the third purported cause of action should be granted without leave to amend.

21 Dated: September 17, 2007

BAKER & HOSTETLER LLP

22
 23 
 24 RONALD J. KLEPETAR
 25 SABRINA L. SHADI
 26 Attorneys for Defendants
 27 THE AMERICAN RED CROSS BLOOD
 28 SERVICES

PROOF OF SERVICE

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 12100 Wilshire Boulevard, 15th Floor, Los Angeles, California 90025-7120. On September 17, 2007, **DEFENDANT AMERICAN RED CROSS BLOOD SERVICES SOUTHERN CALIFORNIA REGION'S REPLY TO PLAINTIFF BRIAN SETENCICH'S OPPOSITION TO MOTION TO DISMISS** will be served on the person(s) listed below:

- ☒ via electronic mail by the United States District Court – Live System.
- ☐ by placing the document(s) listed above in a sealed envelope and causing postage to be placed thereon, fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.
- ☐ by causing the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth below.

Jill P. Telfer, Esq.
 LAW OFFICES OF JILL P. TELFER
 A Professional Corporation
 331 J Street, Suite 200
 Sacramento, CA 95814
 Phone: (916) 446-1916
 Fax: (916) 446-1726
 Email: jilltelfer@yahoo.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 17, 2007, at Los Angeles, California.


 CHARLENE E. STAMPS